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In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-178

WILLIARD E. ROBERTSON,
Petitioner

versus

EDWARD F. WEGMANN, EXECUTOR FOR CLAY L. SHAW, *ET AL.*,
Respondents

On Writ of Certiorari to the Court of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I - REPLY TO RESPONDENT'S BRIEF

Respondent's brief raises two constitutional points which neither the district court nor the Fifth Circuit apparently considered significant since neither was discussed in their opinions. [1]

1. Respondent also urges that Shaw should be permitted "to have his day in court and seek to vindicate his character, his name and his reputation". Resp.Br. at 10. But under our judicial system, it must be concluded that with Shaw's acquittal, as well as the subsequent judgment in his favor permanently enjoining his further prosecution, *Shaw vs Garrison*, 328 F.Supp. 390 (ED La.-1971), aff'd 467 F2d 113 (CA5-1972), cert. den. 409 US 1024, he has already been "vindicated" while still living. What is actually being sought by Respondent in this proceeding are money damages, nothing more.

A - THE EQUAL PROTECTION CLAUSE DOES NOT GUARANTEE UNIFORM SURVIVORSHIP

Respondent states that "There being no uniformity among the various states with respect to survival and abatement, a denial of equal protection is precipitated" (Resp. Br. at 18).

Respondent's argument is clearly both inapposite and incorrect, for, carried to its logical conclusion, such reasoning would hold unconstitutional every federal statute,[2] including §1988,[3] which incorporates state law.

It is central to American federalism that the Constitution permits the legal systems of the states to operate unless preempted by Congress.[4] The Constitution outlines a delegation of federal powers, leaving to Congress a broad discretion to decide whether the power should be exercised by it. Having this discretion not to act at all, Congress has discretion to act incompletely and permit state law to fill the interstices of federal law.[5]

The Civil Rights Act is an example of interstitial law since it is not a complete and self-sufficient body of law. Congress

2. See, *e.g.*, the Federal Tort Claims Act, 28 USC 2674; the Outer Continental Shelf Lands Act, 43 USC 1333(a)(2); the Immigration and Naturalization Act, 8 USC 1101(b)(1), (c)(1); and the Social Security Act, 42 USC 416(h)(1).

3. Respondent does not contest the constitutionality of §1988.

4. For example, the latent power of Congress to legislate over commerce does not preempt all state laws regulating commerce. See *Florida Lime & Avocado Growers, Inc. vs Paul*, 373 US 132 (1963).

5. When Congress exercises a granted power, the federal legislation may displace state law under the Supremacy Clause, although it does not necessarily end all state authority. The federal enactments cited in fn.2, *supra*, are examples of the latter proposition.

has expressly provided in §1988 for the filling of the interstices of the Civil Rights Act, such as survivorship of actions under §1983, by adopting state law to fill the gaps in the act.[6] To the extent that the laws of suvivorship vary among the states, the resulting lack of uniformity is required by the Congressional mandate in §1988 to apply state law.[7]

Moreover, "it is proper . . . that with respect to the statute of limitations and the survival of the action, the considerations of using a modern and comprehensive body of state law should outweigh the considerations of defining the scope of federal rights uniformly throughout the nation".[8]

B - THE CLASSIFICATION OF BENEFICIARIES IN CIVIL CODE ARTICLE 2315 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Respondent correctly states that "This Court has established the principle that the Equal Protection Clause does not

6. 42 USC 1988 (see pp. 6-15 of Petitioner's main brief). State law has been expressly adopted by Congress to fill the interstices of other federal laws. See fn. 2, *supra*.

7. See also Petitioner's main brief at 20-22. The limitations period applicable to civil rights actions also varies among states: *e.g.*, the Louisiana limitation period of one year was applied to an action brought under the Civil Rights Act in *O'Sullivan vs Felix*, 233 US 318 (1914), while the New Jersey limitation period of two years was applied in *Hughes vs Smith*, 389 F2d 42 (CA 3-1968). There has never been in these cases, or in any others so far as counsel is aware - and cannot really be - any holding or suggestion by the courts that such non-uniformity renders unconstitutional either the state laws themselves, or the application of those statutes to the Civil Rights Act whether under §1988 or otherwise.

8. See *Choice of Law Under Section 1983*, 37 U. of Chi. L. Rev. 494 (1970) at p. 506.

make every minor difference in the application of laws to different groups a violation of the Constitution", but argues that "no legitimate state purpose" is manifested by applying Article 2315 (Resp. Br. at 19).

Respondent's argument falls on four counts. First, if the classification of beneficiaries in Article 2315 is unconstitutional under the Fourteenth Amendment, it would follow that the similar classification of beneficiaries in the Federal Employer's Liability Act, the Jones Act, the Longshoremen's and Harbor Workers' Compensation Act and the Death on the High Seas Act[9] would also be unconstitutional under the Fifth Amendment. Of course, Respondent does not even suggest that these federal laws are unconstitutional.

Second, the Constitution contains no guarantee of survival of actions or recognition of the right of an executor to be substituted as plaintiff in an action instituted by a decedent. Absent constitutional mandate, the right of survival is a legislative function. Thus, by enacting Article 2315, the legislature created a right of action in favor of certain designated beneficiaries where none existed before.[10] "[T]he Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all. (citations omitted) It is enough that the State's action be rationally based and free from invidious

9. See Addendum 1, Pet. Br. at 30.

10. Article 2294 of the Civil Code of 1825, the corresponding article to the present Article 2315, contained no provision for survival of tort actions after the death of the injured person, so an action for damages for personal injuries abated on his death. *Hubgh vs N.O. & C.R.R. Co.*, 6 La. Ann. 495 (1851).

discrimination."[11]

Third, "the objective of [Article 2315] clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the [deceased]. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective."[12]

The classification of beneficiaries in Article 2315 makes a rational distinction in favor of those family members for whom the death of the injured party imposes a disproportionate burden in terms of economic and emotional hardship.[13] Under such circumstances, the courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws".[14]

Finally, in providing for transmission of a right vested in the victim to certain designated beneficiaries, Article 2315 is similar to Louisiana's statutory scheme for distribution of property in intestate successions. In both cases, "the power

11. *Dandridge vs Williams*, 397 US 471, 486-487 (1970). To constitute an "invidious discrimination" there must be "a classification which is arbitrary, irrational and not reasonably related to a legitimate purpose". *United States ex rel. Buonoraba vs Commissioner of Correction*, 316 F.Supp. 556, 564 (SD N.Y. - 1970).

12. Paraphrasing this Court in *Reed vs Reed*, 404 US 75, 77 (1971), recognizing the validity of that part of an Idaho statute, while striking down the following section for discrimination because of sex.

13. *Cf. Kahn vs Shevin*, 416 US 351, 355 (1974), in which this Court held that a Florida tax statute which discriminated in favor of widows was not violative of the Equal Protection Clause because it was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden".

14. *Ferguson vs Skrupa*, 372 US 726, 730 (1963). See *Kahn vs Shevin, supra*, 416 US at 356, fn. 10.

to make rules . . .to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State".[15]

Louisiana clearly has "the power to make laws for distribution of property left within the state", and "there is nothing in the vague generalities of the Equal Protection . . . Clause which empowers this Court to nullify the deliberate choices of the elected representatives of the people of Louisiana".[16]

II - REPLY TO *AMICUS CURIAE'S* BRIEF

A - *BY DIRECTING IN §1988 THE ADOPTION OF THE STATE LAW AS FEDERAL LAW, CONGRESS HAS REJECTED - NOT SANCTIONED - JUDICIAL CREATION OF A FEDERAL COMMON LAW OF SURVIVORSHIP*

There is nothing explicit in §1988 giving the federal courts sanction to create federal common law, as asserted by Amicus in its brief (p. 2), nor is there any such implicit sanction in the statute.

Amicus is in error in stating that Petitioner concedes that the federal courts have the power under §1988 to look beyond Louisiana law on survival of actions so as to fulfill the purposes of the Civil Rights Acts (Am. Br. at 10, fn. 10). To the contrary, our position is that §1988 directs that the

15. *Labine vs Vincent*, 401 US 532, 538 (1971).

16. *Ibid.*, pp. 539-540. See also fn. 20, *infra*, Concurring Opinion of Mr. Justice Brennan, *The Tungas vs Skovgaard*, 358 US 588, 609 (1958).

federal courts shall apply and follow the state law if not inconsistent with the "laws of the United States". Petitioner does not concede the correctness of *Sullivan*, but shares more closely the view of Mr. Justices Harlan and White and the Chief Justice with respect to §1988 as set out in their dissent when they stated that "the majority turns this provision on its head by suggesting (1) that §1988 creates a federal remedy, apart from state law, when the remedial provisions of a civil rights statute, like §1982, are 'deficient' . . . If §1988 says anything at all relevant for this case, it suggests that in those cases where it is appropriate to cure remedial deficiencies of a federal civil rights statute by implication, this is to be done by looking to state law to see what remedies, consistent with federal policies would be available there".[17]

Under that view, there is no such power to create federal common law to remedy any legislative deficiencies in the civil rights acts, and if the state law cannot be applied by reason of inconsistency with federal laws, then it is simply not appropriate judicially to cure the legislative defects. That is, and should be, the task of Congress within whose power such legislative responsibility falls - not the federal courts.

Nevertheless, Petitioner's further position is, as indicated in his main brief, that, in any event, the result of *Sullivan* in regards to allowance of damages can perhaps be justified by reason of the fact that there was extant a well-recognized federal rule of damages, as well as a state rule. In the present

17. *Sullivan vs Little Hunting Park*, 396 US 229, 256-257 (1969). It should also be observed that the matter involved here is one of substantive remedy, not a procedural one such as the courts considered in *Lefton vs Hattiesburg*, 333 F2d 280 (CA 5-1964) and other cases cited by Amicus (p. 9, fn. 8).

case, however, there is no rule of survival of action whatever - federal or state - on which the court may rest its attempt to cure the legislative deficiency.

In *Bell vs Hood*, 327 US 678 (1946), on which this Court relied in *Sullivan*, 396 US at 238-239, this Court recognized that it was "any *available* remedy to make good the wrong done" which the "federal court may use" (emphasis supplied). There is no "available remedy" here, other than Louisiana's statute of limited survivorship.

Even should the federal courts still feel compelled to reject that state statute rather than applying it to this case under § 1988, then they must look to Congress to provide some other remedy which it had previously seen fit not otherwise to provide. It is submitted that for this Court not to do so, but now to create a federal common law of absolute survival of § 1983 actions, would be, in the words of this Court, a "bald . . . form of judicial innovation", as well as "drastic . . . judicial legislation". [18]

Amicus' discussion of the Rules of Decision Act, 28 USC § 1652 (Am. Br. at 17-23) is entirely inappropriate, since whatever may have been the course of action open to the federal courts absent § 1988, the fact remains that Congress in enacting § 1988 did act to fix the course of action to be pursued by the courts under the Civil Rights Acts, and the provisions of the state statute must control the disposition of this action, as the statute itself commands. It should be observed, however, that the Rules of Decision Act itself specifies that state laws shall be regarded as rules of decision in common law trials in federal courts "in cases where they

18. *UAW vs Hoosier Cardinal Corp.*, 383 US 696 (1966), at 701 and 703.

apply", so that when federal questions and the United States are involved, as was true in *United States vs Little Lake Misere Land Co.*, 412 US 580 (1973), that Act is not applicable so as to require following state law. That case is accordingly not in point with respect to the issues in the instant one.

This is not a case in which the principles of "choice of law" are applicable - one in which the federal courts, balancing the various factors to which reference is made in Amicus' brief (at 24-34), may or may not apply state law in fashioning a federal rule to govern the action. This is not a case of the type described by this Court in *Clearfield Trust Co. vs United States*, 318 US 363 (1943), in which, "(i)n our choice of the applicable federal rule we have occasionally selected state law". Nor is this case simply one in which such selection "is justified on the assumption 'that Congress has consented to application of state law' " [Am. Br. at 25, quoting *United States vs Standard Oil Co.*, 332 US 301, 309 (1947)].

To the contrary, in the present case Congress has expressly commanded in § 1988 that the federal courts apply the state law to govern the disposition of the case. As the courts in *Brazier, Spence vs Staras, Hall vs Wooten* and *Dean vs Shirer* have all recognized (see Pet. Br. at 15-17), Congress in enacting § 1988, has adopted the state law of the forum as the federal law, or "federal common law", of survivorship of civil rights actions.

Similarly, the basic distinction between those maritime cases involving the application of federal standards rather than state survival laws, and this terrene case, is that the rule in the former is that the federal courts *may* resort to state legislation but should apply uniform federal standards of

relief, whereas in the present case under the Civil Rights Act, Congress expressly provided in § 1988 that the courts *shall* look to the state law of the forum and apply it to the case. In Admiralty, it has long been recognized that the maritime law is a creature of the federal courts, and the observations of Mr. Justice Brennan in his concurring opinion in *The Tungas*, 358 US 588, 597 *et seq.* (1958),[19] and of this Court in *Moragne vs States Marine Lines*, 398 US 375 (1970), are accordingly at least understandable in that context.[20]

However, such maritime cases should not be deemed by the Court to be either binding or persuasive with respect to any situation in which Congress has spoken as to survivorship of an action or as to applicability of the state law in determining any federal question, be it survivorship or otherwise. Thus, in maritime actions for death on the high seas as to which Congress has enacted DOHSA, as distinguished from those actions occurring in state waters,[21] or in actions under the Outer Continental Shelf Lands Act or under §1983 of the

19. Amicus relied on *The Tungas* in its brief (p. 42) in *Jones vs Hildebrant*, 432 US 183 (1977), in which Amicus had appeared as one of the *amici curiae*.

20. Even in Mr. Justice Brennan's concurring opinion in *The Tungas*, however, he fully recognized that "the distribution of funds accruing to a decedent's representatives by reason of his death is a matter, in our federal system, particularly within the competence of the States. Certainly it is not a matter more destructive of the uniform character of the maritime law than were the state statutes of limitations enforced in *Western Fuel Co. vs. Garcia, supra*. And it is no more disturbing to the maritime law whether the state distributional scheme is one provided generally by its law or one peculiar to its Wrongful Death Statute." Thus, it would seem surely to follow that Louisiana's "distributional scheme" under Article 2315 should be readily adopted by the federal courts under §1988 of the Civil Rights Act.

21. See *Mobil Oil Corp. vs Higginbotham*, No. 76-1726, argued before this Court on January 10-11, 1978.

Civil Rights Act in each of which latter acts Congress has expressly directed the federal courts to look to and apply the state law of the forum, the will of Congress - and not of the judiciary - should prevail.

If the federal courts should feel that the result of application of the State law is not the result which it would like, or that the public or federal interest would be better served by a different result, that is still a matter for the legislative branch, not the judiciary. Let the federal courts strongly commend to Congress enactment of an amendment to DOHSA, to the Outer Continental Shelf Lands Act, or to §1988 of the Civil Rights Act to provide such result if, in its legislative wisdom, that is the one to better serve the people of the United States.

B - ANY DETERRENCE OBJECTIVE OF THE CIVIL RIGHTS ACT DOES NOT WARRANT REJECTION OF LOUISIANA'S SURVIVORSHIP STATUTE

The contention of Amicus that the federal courts should reject the applicable state law of survivorship in this case is bottomed on the proposition that the purpose of the Civil Rights Acts, and in particular the Ku Klux Act of 1871, is not only compensatory, but is also to serve as a deterrent.

While the deterrent effect of this suit may be seen while Shaw was alive, that objective at least pales with his death. The needed effect of deterrence should occur prior to death of the victim and, in any event, there will be few cases indeed in which there will be no qualified survivor.[22]

22. In addition, the FELA, Jones Act, LHWCA and DOHSA, certainly all in theory involve policies of deterrence as well as compensation.

If Congress did not see fit to provide for full, absolute survivorship of actions resulting from those acts of invidious discrimination which are the subject of § 1985, it is impossible for Petitioner to comprehend how such absolute survivorship could ever have been envisioned - much less dictated, as Amicus now espouses - by Congress in enacting §1983.

The enactment by the Reconstruction Congress of §1986 [23] in and of itself negates Amicus' assertion that "there is no adequate reason to permit the vindication of constitutional rights, and the deterrence of unconstitutional conduct, to be impeded because of the death of one who claimed denial of his rights" and that "such a result is wholly inconsistent with the purposes of the federal Civil Rights Acts" (Am. Br. at 36).

That the asserted deterrence objective of Congress in enacting the Ku Klux Act of 1871 is not such an overriding factor as to justify the federal courts' refusal to apply a state statute of survivorship in favor of certain designated beneficiaries with respect to an action under § 1983, is amply demonstrated by the action of Congress itself in enacting the exact same form of limited survivorship provision in §1986 which similarly restricts the survival of actions under §1985 of the Act. If Congress had intended the result now championed by Amicus, it seems obvious that Congress would certainly have required the same result as to actions under § 1985 which is the part of the Ku Klux Act aimed specifically at the concerted actions of the white-robed and hooded, night-riding Klan which burned, ravaged, murdered and oth-

23. The pertinent portion of that section provides: ". . .if the death of any party be caused by any such wrongful act and neglect, the legal representative of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased."

erwise terrorized the Blacks of Reconstruction Days.

Amicus further argues that any limitation whatever in the states' survival statutes, must be rejected because they "are inconsistent with the 'complete justice' theme of the Reconstruction statutes" (Am. Br. at 36). Again, it is incomprehensible to Petitioner that Congress could have intended that any "complete justice theme" of its 1871 Act should prevent this Court from applying to this action under §1983, Louisiana's survivorship statute which is restricted only as to designated familial beneficiaries, while Congress itself was enacting at the same time, §1986 which not only similarly restricts survivorship to certain designated familial beneficiaries, but also restricts their recovery to a maximum total of $5,000.

This should also serve to bring down the curtain on the "soap opera" hypothetical situation authored and produced by Amicus (Br. at 37-38), for if the hypothetical severe beating which resulted in death had been perpetrated by defendants as part of any "invidious discrimination" proscribed by § 1985, the hospital and doctors for whom Amicus shows so much concern, would certainly "have no way of being paid for their services", and decedent's orphaned nephew for whom Amicus has so much compassion, would have to be content with a maximum possible gross recovery of $5,000 with which to pursue his college education, in light of the restrictive survival provisions of §1986 of the Act.

Amicus glosses over the fact that - after all of the speeches, veto message, and debates in 1866 and 1871, discussed at some length in Amicus' brief (at 10-15 and 30-31) - the Reconstruction Congress of 1871 nevertheless chose to limit specifically to the widow or next of kin (not to the estate

or a residuary legatee) survival of an action brought by one who eventually died from a beating administered by the Ku Klux Klan. Additionally, Congress limited the amount of that recovery to the relatively minor sum of $5,000.[24]

Finally, it is not accurate to say that, unlike the unlawful constitutional conduct proscribed by the Civil Rights Act, "the loss-shifting rationale of tort and maritime law is designed" to operate with respect to activity which is itself legal. In both tort and maritime law, liability flows as well from illegal activities, such as hit-and-run, DWI, violations of OSHA, violations of Coast Guard regulations, etc.

It should be recognized that under the Civil Law doctrine of Louisiana, Article 2315 is directed at both offenses ("délits") and quasi-offenses ("quasi-délits"), that is, intentional and illegal wrongs, as well as negligent ones (La. Civil Code, Title V).

In sum, deterrence is simply a false issue with respect to applicability of Louisiana law under §1988. It is absolutely absurd to contend that anyone would consider, before violating §1983, the outside possibility that his "victim" might die of natural causes during the pendency of a §1983 action, much less that a public official intent on committing an act violative of §1983 would first stop to investigate whether or not his intended victim had any spouse, children, parents,

24. Amicus' only reference to this point appears in note 35 of its brief, stating: "It would be more than the process of implication can bear to view §1986 as even an indication that survival of Civil Rights actions is inconsistent with Congressional intent." Amicus clearly misses the point. Section 1986 is a patent grant of *limited* survival for a very serious violation of civil rights. Because of its $5,000 limitation, §1986 is even more restrictive than Article 2315 of Louisiana's Civil Code which is to be applied, by virtue of §1988, to the §1983 action at bar.

sister or brother. It is even more absurd to believe that any such public official on the threshold of committing an act violative of §1983 would be encouraged "not to stop after they had injured but to be certain to kill" (Am. Br. at 37, quoting *Davis vs Johnson*, 138 F.Supp. at 574) by a holding of this Court that Louisiana's statute must be applied under §1988.

III - CONCLUSION

In 1976, Congress amended §1988 to add attorneys' fees for violation of, *inter alia*, the Reconstruction Era Civil Rights Acts.[25] It is significant that in considering §1988 at that time Congress still chose not to reject or modify, in any manner, the specific language of §1988 incorporating the law of the forum state.[26] As stated in the Senate Report accompanying the amendment, "The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co. vs Wilderness Society*, 421 U.S. 240 (1975)".[27]

The report goes on to observe that, before the *Alyeska* decision, "[m]any lower Federal courts throughout the Nation . . . were exercising their traditional equity powers

25. Pub. L. 94-559, §2, October 19, 1976, 90 Stat. 2641.

26. The amended §1988 is identical to that enacted by the Reconstruction Congress except for the addition of a sentence providing for attorneys' fees. The Senate Report (Judiciary Committee), No. 94-1011, June 29, 1976 [to accompany S.2278], 1976 U.S. Code Cong. and Adm. News 5908-5914, states, at 5913: "This bill creates no startling new remedy . . . It does not change the statutory provision regarding the protection of civil rights except as it provides the fee awards."

27. *Ibid.*, 1976 U.S. Code Cong. and Adm. News at 5909.

to award attorneys' fees under early civil rights laws . . . However, in *Alyeska*, the United States Supreme Court, while referring to the desirability of fees in a variety of circumstances, ruled that only Congress, and not the courts, could specify which laws were important enough to merit fee shifting under the 'private attorney general' theory. The Court expressed the view, in dictum, that the Reconstruction Acts did not contain the necessary congressional authorization." [28]

The Civil Rights Act is admittedly entirely silent on survival of §1983 actions. § 1988 of that act clearly provides that this gap "shall" be filled by the law of the forum state. Respondent, Amicus, the district court, and the Fifth Circuit have all been unable to cite any laws of the United States with which Article 2315 of the Civil Code can be said to be inconsistent. This Court should apply § 1988 which, though it was reconsidered by Congress only sixteen months ago, still clearly provides for the application of "statutes of the State wherein the Court having jurisdiction of such civil or criminal cause is held".

Even if this Court should possibly find that absolute survival of §1983 actions is a desirable policy, "we need labor the matter no further. It appears to us that the rule suggested [by Respondent and Amicus] here, and adopted by the Court of Appeals, would make major inroads on a policy matter that Congress has reserved for itself". [29] Arguments concerning the policy issue involved in the instant case as to

28. *Id.* at 5911.

29. *Alyeska Pipeline Service Co. vs Wilderness Society*, 421 US 240, 269 (1975).

absolute survivorship of civil rights actions under §1983, "are properly addressed to Congress". [30]

For all of the foregoing reasons, it is again respectfully submitted that the judgment below should be reversed and this action dismissed.

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30. *F. D. Rich Co., Inc. vs United States ex rel. Industrial Lumber Co.*, 417 US 116, 131 (1974).